STATE OF MICHIGAN

COURT OF APPEALS

LAWRENCE HUGHES and LILLIAN HUGHES, as personal representatives of the Estate of STEVEN MICHAEL LLOYD, and BERT SMITH, Individually and as Next Friend of MICHAEL C. SMITH,

Plaintiffs-Appellees,

and

BROCK ANTHONY LLOYD,

Intervening Plaintiff,

v

JACKSON COUNTY ROAD COMMISSION,

Defendant-Appellant.

UNPUBLISHED
April 17, 2007

No. 256652
Jackson Circuit Court
LC No. 02-001766-NO

ON REMAND

Before: Hoekstra, P.J., and Neff and Davis, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court for reconsideration in light of the recent decision in *Wilson v Alpena Co Rd Comm*, 474 Mich 161; 713 NW2d 717 (2006). Because we find the circumstances of this appeal analogous to those in *Wilson*, we again affirm the decision of the trial court and remand this case for further proceedings as in *Wilson*, *id*. at 170-171.

In *Wilson*, the Supreme Court clarified the standard for consideration of claims pleaded in avoidance of government immunity under the highway exception, MCL 691.1402(1). The issue in *Wilson* was "what notice of a defect in a road the governmental agency responsible for road maintenance and repair must have before it can be held liable for damage or injury incurred because of the defect." The highway exception provides in pertinent part:

> [E]ach governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably

> safe and fit for travel may recover the damages suffered by him or her from the governmental agency. [MCL 691.1402(1).]

Further, MCL 691.1403, a notice provision, states:

> No governmental agency is liable for injuries or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place.

In discussing the interplay between MCL 691.1402(1) and MCL 691.1403, the *Wilson* Court stated:

> Thus, with regard to the governmental agency having jurisdiction over a highway, the Legislature has waived immunity from liability for bodily injury or property damage if the road has become, through lack of repair or maintenance, not reasonably safe for public travel. As we explained in *Nawrocki* [*v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000)], MCL 691.1402(1) establishes the duty to maintain the highway in "reasonable repair." The phrase "so that it is reasonably safe and convenient for public travel" simply refers to the duty to maintain and repair, and states the desired outcome of reasonably repairing and maintaining the highway; it does not establish a second duty to keep the highway "reasonably safe." *Nawrocki*, *supra* at 160. Hence, the Legislature has not waived immunity if the repair is reasonable but the road is nonetheless still not reasonably safe because of some other reason. *Nawrocki*, *supra*; *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492; 638 NW2d 396 (2002).
>
> . . . [I]t can also be seen that the converse of this statement is true: that is, the Legislature has not waived immunity where the maintenance is allegedly unreasonable but the road is still reasonably safe for public travel. We note that, pursuant to MCL 691.1403, in order for immunity to be waived, the agency must have had actual or constructive notice of "the defect" before the accident occurred. In determining what constitutes a "defect" under the act, our inquiry is again informed by the "reasonably safe and convenient for public travel" language of MCL 691.1402(1). In other words, an *imperfection* in the roadway will only rise to the level of a compensable "defect" when that imperfection is one which renders the highway not "reasonably safe and convenient for public travel," and the government agency is on notice of that fact.
>
> Thus, while MCL 691.1402(1) only imposes on the governmental agency the duty to "maintain the highway in reasonable repair," in order to successfully allege a violation of that duty, a plaintiff must allege that the governmental agency was on notice that the highway contained a defect rendering it not "reasonably safe and convenient for public travel." The governmental agency does not have a separate duty to eliminate *all* conditions that make the road not

> reasonably safe; rather, an injury will only be compensable when the injury is caused by an unsafe condition, of which the agency had actual or constructive knowledge, which condition stems from a failure to keep the highway in reasonable repair. [*Wilson*, *supra* at 167-168 (footnote omitted).]

The *Wilson* Court held that in the case before it, the parties made no "attempt to argue with supporting evidence the issue of whether the road was reasonably safe for public travel and, if it was not, whether defendant had notice of that condition." *Id*. at 169. The *Wilson* Court observed that while the parties conceded that the defendant had notice of certain problems with the road, i.e., that it contained bumps and required frequent patching, such problems did not mandate a conclusion that the road was not reasonably safe for public travel. Therefore, to prove her case, the plaintiff would be required to show "that a reasonable road commission, aware of this particular condition, would have understood it posed an unreasonable threat to safe public travel and would have addressed it." *Id*. The *Wilson* Court remanded the matter to the trial court for further proceedings consistent with its decision. *Id*. at 170-171.

With respect to notice, in this case, defendant argued that plaintiffs' claims were "barred pursuant to MCL 691.1403 because the road commission did not know, nor had any reason to know, of the alleged defect in Hawkins Road." In our earlier decision, we found no error in the trial court's conclusion that plaintiffs presented sufficient evidence to survive defendant's motion for summary disposition with respect to the issue of notice. *Hughes v Jackson Co Rd Comm*, unpublished opinion per curiam of the Court of Appeals, issued February 9, 2006 (Docket No. 256652). We stated:

> On reconsideration, the trial court found that defendant had constructive notice of the alleged defect:
>
> "Although the testimony is disputed there is testimony that there was a defect in the road on the day of the accident. There is also evidence that a Road Commission employee regularly used the road. If the jury finds this road to be defective, the nature of the defect is such that it [is] unlikely it just became noticeable on that very day. Further, the Road Commission had knowledge that this road regularly needed re-grading. The Road Commission had regularly graded this road in the past because of the washboarding which Plaintiff assets [sic, asserts] is a defect."
>
> We concur in the court's reasoning given the evidence. [*Hughes*, *supra*, slip op pp 3-4.]

In this case, as in *Wilson*, the parties' arguments and evidence did not fully address whether defendant was "aware that the defect rises to the level that, if not repaired, it unreasonably endangers public travel." *Wilson*, *supra* at 163. As we noted in our earlier decision, the issue of notice was a close call, even as presented before this Court in the first appeal. *Hughes*, *supra*, slip op, p 3. Given the clarification in *Wilson*, we conclude that this case

is again most appropriately remanded to the trial court for further proceedings.[1] On remand, "[d]efendant is free to bring a second motion making the proper argument and submitting the proper supporting evidence, and plaintiff[s] may attempt to defeat it by putting competent evidence in the record that defendant had notice that the road was not reasonably safe." *Wilson*, *supra* at 171.

Affirmed and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Alton T. Davis

[1] We conclude that *Wilson* does not warrant a different result on the basis of the issues and evidence before us and that defendant is not entitled to summary disposition on the evidence as presented. Defendant's arguments to the contrary are rejected for the reasons set forth in our earlier opinion.